IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

BENERICCO MARIKA NAIVELI

Appellant

CASE NO: HAA. 11 of 2020
[MC, Suva Criminal. Case No. 589 of 2019]

Vs.

STATE

Respondent

Counsel	**:**	Mr. N. Nawaikula for the Appellant Mr. R. Kumar for the Respondent
Hearing on	**:**	12 May, 2020
Judgment on	**:**	12 June, 2020

JUDGMENT

1. The above named appellant ("the appellant") was charged before the Magistrates Court at Suva with one count of *Unlawful possession of illicit drugs* contrary to section 5(a) of the Illicit Drugs Control Act 2004.

2. The appellant was convicted on 05/11/19 after he pleaded guilty to the said charge and the sentence was delivered on 07/01/20 where he was ordered to pay a fine of $500.

3. The charge reads as follows;

> ***Statement of Offence (a)***
> **UNLAWFUL POSSESSION OF ILLICIT DRUGS:** Contrary to section 5 (a) of the Illicit Drugs Act of 2004.
>
> ***Particulars of Offence (b)***
>
> **BENERICCO MARIKA NAIVELI,** on the 12th day of April, 2019 at Rewa Street, in the Central Division, without lawful authority was in possession of **0.3 grams** of **Cannabis Sativa** an **Illicit Drugs**.

4. The appellant has filed this appeal against his sentence raising the following grounds of appeal;
   a) *THAT Learned Magistrate erred in law when he failed to record a non-conviction sentence as requested by the accused.*
   b) *That Learned Magistrate erred in fact when he failed to take into consideration in his sentencing the effect a recorded conviction would affect the future employment and studies of the accused as stated in the accused mitigation.*
   c) *That the sentence is manifestly harsh considering that the Accused was a 1st Offender, had given an early guilty plea, and that the amount that was possessed was only 0.3 grams.*

5. The facts of this case are straightforward. According to the summary of facts, on 12/04/19, the vehicle the appellant was driving had been seen coming out of a street where a known drug dealer's house is located, by three police officers. The vehicle was then followed by the said police officers, stopped and searched. Upon search, one sachet containing cannabis sativa in the form of dried leaves wrapped in aluminum foil was found in the appellant's possession. The weight of the said leaves was 0.3 grams.

6. The appellant had been produced before the Magistrates Court on 15/04/19. His plea was taken for the first time on 05/11/19 and he had pleaded guilty on the same day. The journal entry for 05/11/19 in the relevant court record also reflects that the summary of facts were read over and explained to the appellant on 05/11/19 and

the Learned Magistrate being satisfied that the plea of guilty was 'voluntary, free from influence and unequivocal', had convicted the appellant as charged.

7. Section 174 of the Criminal Procedure Act 2009 ("Criminal Procedure Act") provides thus;

> 174. *(1) The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*
> *(2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and* ***the court shall convict the accused*** *and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*
> *(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this Decree.*
> . . .
> [Emphasis added]

8. Thus, according to the provisions of section 174(2) of the Criminal Procedure Act, it is mandatory for the Magistrates Court to convict an accused who pleads guilty to a charge before proceeding to sentence in accordance with the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act").

9. The Learned Magistrate in the instant case has followed the correct law and the procedure in convicting the appellant as charged, on 05/11/19. The appellant quite correctly does not challenge the conviction entered on 05/11/19. He assails the decision of the Learned Magistrate to decline his request to order the conviction not to be recorded where the Learned Magistrate had the discretionary power to make such order as a sentencing option under section 15 of the Sentencing and Penalties Act.

10. The sentence in the case at hand was delivered on 07/01/20 and the petition of appeal was filed on 05/02/20. The period within which an appeal should be filed against the said sentence which is 28 days, lapsed on 04/02/20 and therefore there is a delay of 01 day in filing this appeal. The respondent does not take issue with this delay. I would therefore consider it appropriate to regard this appeal as one which

is filed within time.

11. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

> "*It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).*"

12. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had;
    a) acted upon a wrong principle;
    b) allowed extraneous or irrelevant matters to guide or affect him;
    c) mistook the facts; or
    d) did not take into account some relevant consideration.

13. Having heard the submissions made on behalf of the appellant it was clear that the three grounds of appeal raises one and the same issue. That is, 'did the Learned Magistrate err in law or fact when he did not accede to the request made by the appellant not to record a conviction as provided under section 15 of the Sentencing and Penalties Act?'

14. Section 15 of the Sentencing and Penalties Act reads thus;

> *The range of sentencing orders*
>
> *15. (1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this Decree —*
> *(a) record a conviction and order that the offender serve a term of imprisonment;*
> *(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;*

(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;
(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;
(e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];
(f) with or without recording a conviction, order the offender to pay a fine;
(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;
(h) record a conviction and order the discharge of the offender;
(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;
(j) without recording a conviction, order the dismissal of the charge; or
(k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.

(2) All courts may impose the sentences stated in sub-section (1) notwithstanding that a law may state that a penalty is to be imposed upon the conviction of an offender.

(3) As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this Part.

(4) Notwithstanding the provisions of the Community Work Act 1994 and the Probation of Offenders Act[Cap. 22] a court may impose a sentence under sub-section (1)(e) upon finding an offender to be guilty of an offence but without recording a conviction.

(5) When sentencing or dealing with offenders who, by reason of their mental state have been found to be unfit to plead or have established a defence under law related to their mental impairment, the provisions of this Decree may only be applied subject to any aw which makes specific provision for dealing with such offenders.

15. It should be noted that subsections 15(1)(e), 15(1)(f), 15(1)(i) and 15(1)(j) of the Sentencing and Penalties Act provides the sentencing court the discretion not to

record a conviction.

16. Section 16(1) of the Sentencing and Penalties Act provides that a sentencing court shall have regard to all the circumstances of the case when exercising the discretion whether or not to record a conviction, but nevertheless, the circumstances so considered should necessarily include the three factors listed in that section. The said section reads as follows;

> *16. (1) In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including —*
>
> *(a) the nature of the offence;*
>
> *(b) the character and past history of the offender; and*
>
> *(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.*

17. It is pertinent to note that subsections 15(1)(i) and 15(1)(j) go a step further than simply providing for a conviction not be recorded and provide for dismissal, discharge and adjournment. Section 43 of the Sentencing and Penalties Act provides the purpose of issuing such orders (for dismissal discharge and adjournment). Section 43(1) of the Sentencing and Penalties Act reads thus;

> *43. (1) An order may be made under this Part —*
>
> *(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;*
>
> *(b) to take account of the trivial, technical or minor nature of the offence committed;*
>
> *(c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;*
>
> *(d) to allow for circumstances in which it is inappropriate to record a conviction;*
>
> *(e) to allow for the existence of other extenuating or exceptional circumstances that justifies a court showing mercy to an offender.*

18. Gates CJ (as he was then) in the case of ***State v Batiratu*** [2012] FJHC 864; HAR001.2012 (13 February 2012) expounded on exercising the judicial discretion not to record a conviction when dealing with a case where the Magistrates Court had made an order purportedly under section 15(1)(i) of the Sentencing and Penalties Act.

19. It is pertinent to recall that section 174(2) of the Criminal Procedure Act makes it mandatory for a Magistrate to convict an accused upon a guilty plea. According to the language used in the said section 174(2), convicting an accused who had admitted the truth of the charge is a condition precedent before the Sentencing and Penalties Act becomes applicable to the relevant case. An accused is convicted in terms of section 174(2) for the reason that the elements of the relevant offence are satisfied and thereby the relevant offence is established, given the admissions made by the accused. Therefore, convicting an accused as required by section 174(2) of the Criminal Procedure Act does not form part of the sentence and does not amount to a punishment.

20. I am aware of a recent decision of this court whereby it was held that the Learned Magistrates should have regard to section 11(1) of the 2013 Constitution of the Republic of Fiji ("the Constitution") before entering a conviction on a plea of guilty. I beg to differ with that opinion. While the freedom from cruel and degrading treatment is an inalienable right enshrined in section 11 of the Constitution, in my view, the said section has no application when an accused is convicted in terms of section 174(2) of the Criminal Procedure Act. Moreover, section 11(1) of the Constitution has no bearing when it comes to sentencing an accused for an offence by exercising the judicial discretion to impose a penalty pursuant to the punitive provisions relevant to that offence as legislated under the relevant Act, in accordance with the Sentencing and Penalties Act. A sentence imposed by a court of law may be regarded as harsh or excessive, but not unconstitutional.

21. The effect of sections 15(1)(e), 15(1)(f), 15(1)(i) or 15(1)(j) of the Sentencing and Penalties Act should therefore be understood as granting of discretion not to record

a conviction as a sentencing option based on the mitigating factors subjective to the accused and on the nature of the offence. Making an order not to record a conviction in terms of sections 15(1)(e), 15(1)(f), 15(1)(i) or 15(1)(j) read with section 16(1) of the Sentencing and Penalties Act forms part of the sentence. Accordingly, if a sentencer uses the discretion not to record a conviction in terms of the said sections 15(1)(e), 15(1)(f), 15(1)(i) or 15(1)(j), the conviction entered under section 174(2) of the Criminal Procedure Act is deemed as a conviction not recorded.

22. It should be noted that section 15 and section 16 of the Sentencing and Penalties Act cannot be read as sections that are only applicable to the Magistrates Court or only applicable to Magistrates Court when dealing with guilty pleas. The said sections are meant to apply to any sentencing court whether it is the Magistrates Court or the High Court and whether an accused is sentenced on a plea of guilty or after trial. Further, the application of these sections are not limited to any category of offences. Therefore, the said sections are supposed to apply even for the offences like rape and aggravated robbery.

23. Therefore the approach to section 15 and section 16 of the Sentencing and Penalties Act should be pragmatic. Invariably, entering or recording a conviction when an accused is found guilty either on a plea of guilty or after trial should be accepted as the default position. That does not prevent a sentencing court to order that a conviction should not be recorded as a sentencing option in terms of sections 15(1)(e), 15(1)(f), 15(1)(i) or 15(1)(j) of the Sentencing and Penalties Act, having heard the mitigation. A sentencing court could exercise the discretion provided under section 16(1) of the Sentencing and Penalties act on its own motion or at the instance of the accused. However, since the default position is, to record a conviction when an accused is found guilty of an offence, a sentencing court does not fall into error by not deliberating on whether a conviction should not be recorded when sentencing an accused in the absence of an application in that regard from the accused.

24. Now I would turn to examine the case at hand. The weight of the drugs found in the

possession of the appellant was 0.3 grams. According to the majority decision in ***Sulua v. State*** [2012] FJCA 33, the applicable tariff is as follows;

> "*a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered*"

25. According to the court record and also as acknowledged by the Learned Magistrate in the impugned decision, the appellant had made an application not to record a conviction. The Learned Magistrate has stated in paragraph 07 of the decision that, having referred to the case of ***Batiratu*** (supra) and to sections 16 and 45 of the Sentencing and Penalties Act he does not find this a fit case not to record a conviction. Though the impugned decision reflects that the Learned Magistrate was mindful of the relevant provisions of the Sentencing and Penalties Act and the case of ***Batiratu*** (supra), I do note that the Learned Magistrate has been economical with his reasoning with regard to his decision to refuse this application of the appellant.

26. The learned counsel for the respondent submitted that the impugned decision does not reflect any error of law or principle. According to the counsel the scarcity noted in the reasoning could be attributed to the workload a Magistrates Court is required to handle which he describes in the written submissions as "*the fast paced summary nature of the Magistrates' Court*".

27. Lack of reasoning in the sentencing remarks alone is not a ground for an appellate court to interfere with a sentence imposed by a subordinate court unless it could be established that certain relevant considerations were not taken into account and due to that failure a substantial miscarriage of justice has actually occurred [vide section 256(2)(f) of the Criminal Procedure Act].

28. Therefore, in this case the appellant should demonstrate that the Learned Magistrate had not considered relevant factors, and had he considered those factors, it was not open for the Learned Magistrate to reach the conclusion he had reached in this case. That is, the appellant should demonstrate the following;

a) The factors the Learned Magistrate had not considered;
b) Those factors were relevant for the exercise of the discretion under section 16(1) of the Sentencing and Penalties Act; and
c) Had those factors been considered, it was not open for the Learned Magistrate to allow the conviction to remain as recorded.

29. Under the first ground of appeal where the appellant claims that the Learned Magistrate erred in law by failing to record a non-conviction, the appellant argues that the Learned Magistrate had not considered the three circumstances laid down in section 16(1) of the Sentencing and Penalties Act.

30. The learned counsel for the appellant also submits on this ground referring to paragraph 4 of the impugned decision that the "*only submission in regards to the request for non-conviction was that the action by the appellant was out of character and no other reasons to justify his actions*". This appear to be a miscomprehension as I note that the said paragraph 4 of the impugned decision is nothing more than an attempt to recount the following paragraph in the mitigation submission filed on behalf of the appellant;

> "*Our client has no justifiable reason to put forth to justify the reasons for his actions that lead him into the commission of this offence. He submits that he acted out of character and genuinely regrets his actions*."

31. With regard to the appellant's claim that the Learned Magistrate had failed to consider the provisions of section 16(1) of the Sentencing and Penalties Act, at the outset, it should be noted as stated earlier that the Learned Magistrate had mentioned in paragraph 7 of the impugned decision that he had considered section 16 of the Sentencing and Penalties Act before concluding that the Appellant's case is not a fit case to exercise the discretion not to record a conviction.

32. The first factor listed under the said section 16(1) is 'the nature of the offence'. The appellant had committed the offence of possession of illicit drugs. Needless to say,

this is a serious offence which has serious implications on the offender, the offender's family and friends, and the society as a whole. Offences involving illicit drugs especially possession appear to be on the increase. Taken in isolation, this factor does not support a non-conviction even if the quantity of the illicit drugs involved with the offence is small. The reason being that a message cannot be passed to the society that there will be little or no legal ramifications for dealing with a small quantity of illicit drugs.

33. The second factor is the character and the past history of the offender. The appellant was a first offender and the learned counsel for the appellant argues that the Learned Magistrate failed to consider this fact. The sentencing remarks does not refer to the fact that the appellant was a first offender. However, the fact that an accused who commits a drug related offence is a first offender alone should not entitle him/ her a non-conviction on that offence that was committed. The following sentiments of Nawana J in the case of ***State v Tilalevu*** [2010] FJHC 258; HAC081.2010 (20 July 2010) is pertinent in this regard;

> "*I might add that the imposition of suspended terms on first offenders would infect the society with a situation - which I propose to invent as* '***First Offender Syndrome***' *- where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule.*"

34. The third factor under the said section 16(1) is 'the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects'.

35. The appellant had submitted to the Magistrates Court during mitigation that a conviction could hinder his opportunities of travelling abroad and future employment. It was submitted that the appellant is pursuing his studies and he aspires to be an accountant and a rugby coach in America.

36. It is noted that the sentencing remarks does not specifically mention that the Learned Magistrate had considered the aforementioned facts. However, especially given the fact that the appellant was 33 years old at the time of the offending and that he had made an informed decision according to the summary of facts to have the drugs in his possession where he appear to have purchased the drugs from a drug-dealer, I do not find the aforementioned future plans of the appellant to constitute a sufficient basis that would warrant a non-conviction.

37. Every person has to live with the consequences of his/ her actions based on the decisions that he/ she makes in life. The appellant by the time he committed the offence relevant to this case was mature enough to understand this and the need to refrain from engaging in conduct that would impede his future plans.

38. Invariably, a conviction would have an impact on every offender. An order that the conviction should not be recorded would be justified if the welfare or the best interest of the accused in terms of the impact of a conviction on that accused's economic or social well-being, and on his or her employment prospects, would still standout when weighed against all the other circumstances of the case especially the nature of the offence, circumstances of the offending, the culpability of the accused, the character and the past history of the accused and also the public interest.

39. What I said in paragraph 15 of the decision in ***State v Lesunavanua*** [2019] FJHC 596; HAC30.2019 (18 June 2019) which is produced below would be relevant in this regard;

> "*In dealing with this case, I consider it pertinent to remind myself of the rules Sir Matthew Hale came up in 1660 for Judges which are produced below. Sir Matthew Hale became the Lord Chief Justice of the court of King's Bench in 1671. His Lordship formulated 18 rules to guide his own conduct as a judge and the rules that I consider relevant in this case are the ones provided below;*
>
> *13. If in criminals it be a measuring cast, to incline to mercy and acquittal.*

14. In criminals that consist merely in words, when no more harm ensues, moderation is no injustice.

15. In criminals of blood, if the fact be evident, severity in justice."

40. In my view, if the accused who had committed the offence of possession of illicit drugs is a first offender, a young offender, the quantity of the drugs involved with the offence is minimal and if the offence could be regarded as opportunistic, a non-conviction may be justified.

41. For example, a non-conviction may be justified in a case where the accused is an 18-year-old first offender who had attended a function which one of his friends had brought cannabis sativa without his knowledge, but then had smoked those drugs at the insistence of his friend and then caught by the police while having the possession of the drugs.

42. The case of ***State v Ratu*** [2015] FJMC 91; Criminal Case 432.15 (12 August 2015) which is highlighted by the learned counsel for the appellant in his supplementary written submissions, is such a case where a non-conviction was justified where the accused was an 18-year-old first offender, a first year university student who was found having in possession of 0.2 grams of cannabis sativa, smoking with two of his friends.

43. Therefore, even if the factors highlighted by the learned counsel for the appellant under the first ground of appeal were considered by the Learned Magistrate (assuming that he did not when the sentence was delivered), it was open to the Learned Magistrate to conclude that the appellant's case was not a fit case to order that the conviction should not be recorded.

44. For the reasons above, ground one should fail.

45. The complaint made on the second ground of appeal is that the Learned Magistrate erred in fact by failing to consider the effect of a recorded conviction on the future

employment and studies. This issue has already been addressed in the discussion on the first ground of appeal.

46. The appellant on the third ground of appeal alleges that the sentence is manifestly harsh. The sentence imposed on the appellant is a fine of $500. This is neither harsh nor excessive.

47. The learned counsel for the appellant had addressed both second and third grounds of appeal together in the written submissions and had submitted that the Learned Magistrate had failed to consider the guidelines discussed in the case of ***Batiratu*** (supra). The counsel further argues that the conduct of the appellant is morally blameless and it was a technical breach of the law. The appellant relies on the following dictum in ***Batiratu*** (supra);

> "*[29] The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether:*
> *(a) The offender is morally blameless.*
> *(b) Whether only a technical breach in the law has occurred.*
> *(c) Whether the offence is of a trivial or minor nature.*
> *(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.*
> *(e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.*
> *(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.*"

48. As noted earlier, the Learned Magistrate had in fact referred to ***Batiratu*** (supra). However, it is pertinent to note that the dictum in ***Batiratu*** (supra) alluded to above which is relied upon by the learned counsel for the appellant is relevant to an application for discharging an accused without conviction. That was not the application made by the appellant before the Magistrates Court in this case.

49. The contention that the appellant in this case is morally blameless and his conduct

amounts to a technical breach of the law in my view is completely fallacious.

50. Accordingly, grounds two and three should also fail.

51. Even if it is assumed that the Learned Magistrate had not considered the matters pointed out by the learned counsel for the appellant in this appeal under all the three grounds of appeal given that the sentencing remarks do not specifically refer to those matters, it is clear that it was open for the Learned Magistrate to come to the same conclusion after taking into account those matters. Given the reference to the relevant sections and the case authority it is more probable than not that the Learned Magistrate may have taken all those matters into consideration. The fact that only a fine was imposed in this case indicates that the Learned Magistrate had in fact taken into account the facts of the case and the mitigation submission in delivering the sentence.

52. I am compelled to make the observation that this appeal could have been avoided if the Learned Magistrate had demonstrated in the sentencing remarks how he dealt with the factors highlighted in mitigation relevant to the application not to record a conviction.

53. Nevertheless, where the court below was required to exercise judicial discretion in making a decision, unless it can be demonstrated that the said court had erred in law or failed to apply proper principles in exercising that discretion and that that error or the failure had led to a substantial miscarriage of justice, an appellate court cannot interfere with the exercise of such discretion of the subordinate court even if the appellate court may have exercised that discretion differently to arrive at a different conclusion.

54. For example, where the court below had sentenced an accused for an imprisonment term of 02 years and 01 month in a particular case, and the appellate court would have imposed a sentence of 02 years imprisonment given the same circumstances, the appellate jurisdiction (or revisionary jurisdiction) cannot be exercised merely to

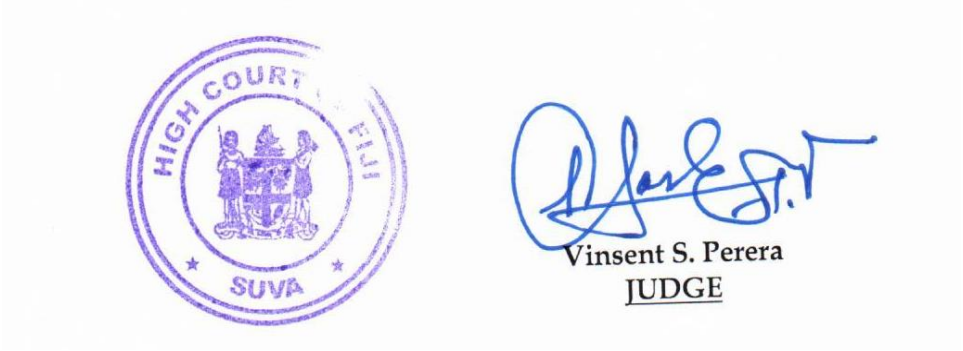
replace the decision of the subordinate court with the appellate court's decision.

55. In the light of the forgoing, I would dismiss this appeal.

Orders;

a) The appeal is dismissed; and

b) The sentence delivered on 07/01/20 in Magistrates Court Suva Criminal Case No. 589 of 2019 is affirmed.



Solicitors;
Nawaikula Esquire, Lawyers for the Accused
Office of the Director of Public Prosecutions for the State